72-31

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-313

ROBERT W. KELLEY, et al., HENRY C. MAXWELL, JR., et al.,
Respondents,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, et al.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported, but is set out in its entirety as Appendix "B" to this petition at pages A-25–A-65. The opinion of the District Court likewise has not yet been officially reported insofar as we can ascertain, but is set out as Appendix "A" at pages A-1–A-24.

JURISDICTION

The opinion and order of the United States Court of Appeals for the Sixth Circuit was entered on May 30, 1972. A petition for stay pending the filing of a petition for certiorari to this Honorable Court was denied by the Court of Appeals for the Sixth Circuit on July 25, 1972 (Appendix "C", p. A-66).

QUESTIONS PRESENTED

1. The District Court made no finding that assignment of children to the school nearest their home would not effectively dismantle the city's dual school system to the extent that it was state-imposed. Nevertheless, the District Court ordered cross-town busing with some bus rides as long as three hours, necessitating staggered openings of schools (from 7 A. M. to 10 A. M.) and staggered closings (from 1:30 P. M. to 4:30 P. M.), with the result that in winter months young children walked to pick-up points before daylight, and walked home after dark, along streets sometimes unlighted and sometimes without sidewalks. Did the Court of Appeals err in affirming the judgment despite the absence of any finding by the District Court that such busing was necessary to eliminate state imposed segregation?[1]

2. The District Court approved a plan for the desegregation of schools which fixed a definite percentage of racial mix for each school and directed no deviation therefrom which would lessen the degree of fixed racial mix. Was the Court of Appeals in error in affirming the District Court on the theory that **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U. S. 1, permitted (required) such as a matter of substantive constitutional law?

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[1] This obviously creates situations where working mothers with three or more school children are forced to leave for work before the children leave for school and children can be unattended for as much as two and a half hours before school.

3. Without compliance with Rule 23 of the Federal Rules of Civil Procedure, the District Court entered a judgment requiring the busing of children of a class of which none of the plaintiffs was a member. Did failure of the parties to invoke Rule 23 prior to judgment constitute a waiver which relieved the Court of its duty of compliance and thereby validated the judgment?

STATUTES INVOLVED

This petition for certiorari involves no statute, but involves Rule 23 of the Federal Rules of Civil Procedure and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This case originated in 1955 when suit was instituted by Robert W. Kelley et al., seeking desegregation of the Nashville school system only. In 1960 the Henry C. Maxwell, Jr., et al., case was filed and it sought desegregation of the Davidson County schools. Subsequently, the governments of the City of Nashville and of Davidson County were consolidated, and in September, 1963, the two cases were likewise consolidated. Prior to September, 1963, the Court had approved plans for the desegregation of each of the two school systems which were substantially identical. After the consolidation of the governments of Nashville and Davidson County there was only one school board and it was known as the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, which is the petitioner here.

Following petitions in the consolidated desegregation cases based upon the insistence that the school system was not complying with new concepts for desegregation as announced by this Honorable Court, and hearings before the then district judge, the Honorable William E. Miller, the petitioning school board submitted plans and

hearings were had before Judge Miller and his successor, Judge L. Clure Morton, which began in March of 1971, and continued, though not continuously, through June 9, 1971. The hearing before Judge Morton was predicated upon pleadings filed by some of the original plaintiffs and some additional plaintiffs, and alleged that the original plaintiffs had either graduated or were enrolled in schools which were desegregated, and sought leave for additional students of Cameron High School to intervene and become plaintiffs, which was allowed. The only named plaintiff or intervening plaintiff remaining in school at the time of the hearing and at the time of the decision in the District Court was a student in senior high school.

At the hearing the Court rejected the plan submitted by the school board and the plan submitted by plaintiffs. The Court requested the Department of Health, Education and Welfare to submit a plan and adopted the plan submitted with minor variations. Basically, the plan contemplated cross-town busing of black students to formerly white schools in grades one through six and the transportation of white students to formerly all black or predominantly black schools in the other grades so that the nonelementary grades would occupy the space vacated by the elementary grades during the school day. As a part of the plan the District Judge adopted the charts appearing at pages A-21 through A-24 of Appendix "A", which charts fixed a definite percentage of racial mix for each school, and the District Court in its opinion, at page A-11 of Appendix "A", authorized the board of education to make minor alterations in the boundaries, provided such alterations did not lessen the degree of segregation in the plan.

After the plan adopted by the District Court was implemented, the director of schools filed a report attached as Appendix "D" to this petition, which report reflects the hardships encountered in the execution of the plan.

ARGUMENT

Question 1

This Court has previously pointed out in its opinions, and especially **Swann v. Charlotte Mecklenburg Board of Education**, *supra*, that the hardships of the plan adopted on the students being transported, the danger to the health and safety of the children and the extreme difficulty of complying with the plan, as exemplified by the staggered hours and opening and closing of the schools, are all matters which should be considered in determining whether the plan or remedy adopted by the District Court is erroneous. The anticipated hardships suggested to the District Court became apparent when the plan was implemented, as shown by report filed with the District Court by the director of schools, attached hereto as Appendix "D". In the late fall and winter, according to the weather bureau, the report shows the sun ries at 6:39 A. M. on December 1 and sets at 4:32 P. M. In order to comply with the plan formulated by the District Court it was necessary that 133 school openings be staggered to begin at thirty minute intervals from 7 A. M. to 10 A. M., and closings staggered at thirty minute intervals with the latest schools let out at 4 P. M. and 4:30 P. M. Buses serving schools opening at 7 A. M. begin their routes at 6:05 A. M., which is thirty-four minutes before sunrise on December 1. Children must walk from their homes to designated pick-up points, and consequently those picked up at the beginning of the route may be on the street as much as an hour before sunrise. Children who live within a mile and a half of the school to which they are assigned (and for whom buses are therefore not available) have to leave home in time for 7 A. M. openings, necessitating many of

them walking to their designated school in darkness, and of those attending schools opening at a later time some will return home from school walking in darkness. In many instances the report shows these children are walking along streets without either street lights or sidewalks, or street lights and no sidewalks or sidewalks and no street lights (Appendix "D", pp. A-67–A-74).

The average time of a student on a bus transported across town is forty-five minutes each way and the longest period of time required for cross-town transportation is one and one-half hours each way. Thus the average time of a student on a bus transported across town is a total of one and one-half hours of riding time and the longest three hours of riding time. Twenty-eight thousand students are transported from the suburbs to the inner city or vice versa each day, and approximately 400 round trips are required across town daily by the 211 buses.

It thus results that the plan adopted by the District Court and approved by the Court of Appeals has resulted in substantial hardship to the children, both from the point of view of time required to be on the bus and the point of view of health and safety, and thus trespasses the limits on school bus transportation indicated by this Honorable Court in the opinion on the application to stay in the case of **Winston-Salem etc. v. Catherine Scott et al.**, filed by the Honorable Chief Justice as the Circuit Justice on August 31, 1971, and further the opinion of this Court in the **Swann** case, 402 U. S. 29-31.

Since **Swann** the test of a plan of integration is whether it is feasible, workable, effective and realistic. A plan which exposes children to the hardships enumerated above cannot possibly meet any of these criteria.

Question 2

The plan formulated by the District Court and approved by the Court of Appeals, as shown by the tables attached to the District Court's opinion (Appendix "A"), clearly shows that the Court fixed a definite percentage of racial mix, at least for elementary school children (Appendix "A", pp. A-21, A-24), from which there could be no deviation lessening the percentage of mix. Apparently such was predicated upon the same misconception of the holding of this Honorable Court as was noted by Chief Justice Burger in the **Winston-Salem** opinion on the application to stay, where the Chief Justice in referring to the **Swann** case quoted in part as follows:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

Although the opinion of the District Court shows unmistakably by its frequent reference to the **Swann** opinion that the Court was attempting to be guided by it, the result is that the Court finds in formulating the plan and order based thereon, especially with the elementary schools, that a particular degree of racial balance or mix was required as a matter of substantive constitutional right.

This error was compounded, we respectfully submit, by the Court of Appeals in affirming the District Court's judgment.

Question 3

It is the petitioner's insistence that it is the duty of the plaintiff in an alleged class action to sustain the action in compliance with Rule 23. Upon failure of the plaintiff to do so, the defendant may challenge the action as a class action. But whether either the plaintiffs or the defendants challenge the action as a class action, or the appropriateness of the class, Rule 23 requires a finding by the Court prior to judgment that the plaintiffs will fairly and adequately protect the interests of the class. There was no such finding by the District Court, nor was there a finding of who constituted the class.

This Honorable Court, on Monday, February 28, 1966, entered its order approving amendments and additions to the Rules of Civil Procedure which were to take effect July 1, 1966, and were to govern all proceedings in actions brought thereafter and in all further proceedings in actions then pending, except to the extent that in the opinion of the Court application in a particular action then pending would not be feasible or would work an injustice. Among the amendments and additions is the new Rule 23 relating to class actions, subsection (c) of which requires the District Court as soon as practicable after the commencement of an action brought as a class action to determine by **order** (emphasis ours) whether it is to be so maintained. Such determination would require the trial court to make findings contemplated by Rule 23(a), (b) and (c), or a finding to the effect that the application of Rule 23 to a pending action was not feasible or would work an injustice. No such order was entered in these cases and no finding was in fact made, even though only one named plaintiff remained in school at the time of the trial of the cases in 1971, and this named plaintiff was in senior high school. There was no plaintiff at the time of the trial in 1971, representing the elementary

school grades or children, and none representing the junior high school grades or children. There was no finding by the trial court of who constituted the class for whose benefit the action was brought or that plaintiff would adequately and fairly represent the interest of the class, as required by Rule 23(c), but the relief ordered was substantially different for the kindergarten and elementary grades from that ordered for the junior and senior high schools.

For example, at the elementary grade level the plan required the cross-town transportation of black children to white or predominantly white schools. The plan did not require transportation of white children at the elementary grade level. The only plaintiff remaining in school at the time of the trial of this case was in senior high school. So it is that the elementary grades had no representative before the Court to speak for them, notwithstanding the fact that the decree was to be binding on the elementary grade students and res adjudicata of their rights.

The District Court and the Court of Appeals, without passing upon the validity of this requirement, simply held that the same was waived by the plaintiff, whereas the rule is directed to the duty of the Court and not the duty of the parties. It is respectfully submitted that the Court of Appeals erred in affirming the District Court's total disregard of Rule 23.

CONCLUSION

This petition for certiorari should therefore be granted so that the meaning of **Swann** can be further clarified and the application of Rule 23 to this proceeding be determined for the protection of the class in the future.

Respectfully submitted

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